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Furniture Distribution Center v. M. Vaughn Bitner : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FURNITURE DISTRIBUTION CENTER, a Utah corporation, Plaintiff-Appellee, vs. M. VAUGHN BITNER; BARRY LYNN BURKINSHAW; GEORGE H. MARX; ANN P. MILES; SUMMIT COUNTY, a political subdivision of the State of Utah; and JOHN DOES 1 through 10, Defendants-Appellant.	BRIEF OF APPELLEE Case No. 900033 Priority No. 16

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT
COURT OF SUMMIT COUNTY, STATE OF UTAH
HONORABLE TIMOTHY R. HANSON, JUDGE

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II. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2 (3)(j) (Supp. 1990) and Rule 3(a) of the Utah Rules of Appellate procedure to consider this appeal from an order of the Third Judicial District Court for Summit County, granting the motion of plaintiff Furniture Distribution Center ("FDC") for partial summary judgment against defendant Ann P. Miles ("Miles").

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The sole issues presented by this appeal are

(1) whether the lower court erred in entering summary judgment against defendant Miles since there was no genuine issue of material fact based upon Miles' failure under Utah R. Civ. P. 56(e) and Rule 4-501 of the Utah Code of Judicial Administration to refute plaintiff FDC's sworn facts by proper affidavit; Busch Corp. v. State Farm Fire and Casualty Co., 743 P.2d 1217 (Utah 1987);

(2) whether this Court should review appellant Miles' arguments, which are raised for the first time on appeal; Busch Corp. v. State Farm Fire & Casualty Co., supra; and

(3) whether, as a matter of law and undisputed fact, FDC was entitled by statute and due process to notice by mail or equivalent means of the final tax sale of FDC's property and, if so, whether Summit County's failure to give FDC such notice invalidated the tax sale as a matter of law. See Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950); Fivas v. Petersen, 5 Utah 2d 280, 300 P.2d 635 (1956); Utah Code Ann. § 59-2-1351(2) (Supp. 1990).

IV. DETERMINATIVE RULES & STATUTES

Rule 56(c), (e) of the Utah Rules of Civil Procedure and Rule 4-501(5) of the Utah Code of Judicial Administration (1988) (amended 1990) are critical to this appeal. Rule 56(c), (e) provides in pertinent part:

> (c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law . . . .
>
> (e) . . . When a motion for summary judgment is made and supported [by affidavit] as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 4-501(5) of the Utah Code of Judicial Administration provides in part:

> The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing parties' statement.

The determinative statute, the entire text of which is reproduced as an exhibit in Appendix A, is Utah Code Ann. § 59-2-1351(2) (Supp. 1990) (formerly § 59-10-64(1) (1953)).

V. STATEMENT OF THE CASE AND FACTS RELEVANT TO APPEAL

The facts pertinent to this appeal are those set forth in the memorandum in support of FDC's motion for partial summary judgment and the supporting affidavit of FDC's president, Clarence A. Persch. Since Miles did not specifically controvert any of those facts in opposition to FDC's motion, this Court must take those facts as established under Rule 56(c) of the Utah Rules of Civil Procedure and Rule 4-501 of the Utah Code of Judicial Administration. Those facts, as set forth in the record below, as well as relevant procedural facts, are as follows:

1. On September 13, 1979, FDC as buyer, entered into a Uniform Real Estate Contract ("UREC") with Barry Lynn Burkinshaw ("Burkinshaw") as seller, for the purchase of the real property located in Summit County, known as "Lot 5, Stagecoach Estates, Plat 'C,'" and more particularly described as follows:

> Commencing at a point North 1392.47 feet and West 4357.86 feet of the Southeast corner of Section 32, Township 1 North, Range 4 East, Salt Lake Base and Meridian and running thence South 45°0' West 1256.38 feet; thence South 40°30' East 384.71 feet; thence North 44°00' East 1202.27 feet; thence North 31°53' West 372.25 feet to beginning.

(R. 2-3, 167, 169-70)

2. On September 18, 1979, FDC recorded in the office of the Summit County Recorder a Notice of Contract regarding the UREC (R. 3, 12, 170, 180-81).

3. Burkinshaw, the seller under the UREC, had acquired the property by quitclaim deed from M. Vaughn Bitner ("Bitner") on or about November 30, 1978 (R. 170, 211, 213-14).

4. Bitner and his wife subsequently executed a quitclaim deed conveying the subject property to Burkinshaw on or about September 13, 1979. That deed was recorded in the office of the Summit County Recorder on or about September 18, 1979 (R. 170, 217).

5. FDC made regular payments as required by the UREC until the agreed-upon purchase price of $18,550.00, plus interest, was paid in full (R. 167, 170).

6. During the executory period of the UREC, FDC inquired of the Summit County Assessor's office as to its liability for payment of real property taxes on the subject property. FDC was told in response that the title work on the subdivision, of which the subject property is a part, had not been completed; consequently, the County could not allocate to FDC a portion of the tax liability on the entire subdivision or otherwise assess to FDC property taxes on the subject property (R. 168, 171).

7. In fact, Summit County sent tax notices regarding the subject property to Bitner (R. 171, 186-87, 195-200).

8. Real property taxes due on the subject property became delinquent for the years 1979 to 1984. Summit County at no time

gave FDC notice of any tax delinquency on the subject property by mail or by personal service (R. 171, 183-84).

9. Prior to 1987, FDC had no actual notice of any tax delinquency on the subject property (R. 168, 171).

10. On or about May 3, 1984, Summit County sent to Bitner by certified mail, return receipt requested, a notice of final tax sale to satisfy delinquent property taxes on the subject property (R. 171, 187, 208-09, 218-21).

11. Summit County did not give FDC notice of the final tax sale by mail or by personal service, nor did FDC have actual notice of the final tax sale at any time before the sale (R. 168, 172, 184).

12. On May 23, 1984, Summit County sold the subject property to Bitner at the final tax sale for $637.89. On May 24, 1984, the County delivered to Bitner a tax deed to the subject property (R. 172 184-85, 210).

13. Bitner subsequently quitclaimed his interest in the subject property to Miles (R. 172, 215-16).

14. Summit County does not claim an interest in the subject property. Both Burkinshaw and George H. Marx, to whom Burkinshaw assigned his interest in the UREC, have disclaimed any interest in the subject property and have offered and tendered to FDC their respective interests, if any, in the subject property (R. 172, 222-23, 231-34, 236).[1]

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[1] Immediately following page 236 and before page 237 of the record is an unnumbered page. Paragraph 8 of that page, which is part of George H. Marx's affidavit, also establishes these facts.

15. After learning that Bitner and Miles claimed to own the subject property pursuant to the tax deed from Summit County, FDC notified Bitner and Miles that FDC owned the property and demanded that they return the property to FDC. When they failed and refused to do so, FDC filed this lawsuit in February 1988 (R. 6, 9).

16. FDC filed a motion for partial summary judgment on its First Cause of Action against all defendants, seeking an order declaring the final tax sale, tax deed and all subsequent purported conveyances of the subject property invalid and void, and quieting title to the property in FDC as against the defendants below and all persons claiming under them. FDC's motion was supported by a memorandum of points and authorities and the affidavit of FDC's president, Clarence A. Persch (R. 164-236).

17. In response, Bitner and Miles submitted a memorandum of points and authorities, but chose not to submit counter-affidavits as required under Rule 56(e) of the Utah Rules of Civil Procedure (R. 239-43). Bitner and Miles also determined not to controvert specifically in their memorandum any of the facts set forth in FDC's memorandum to avoid having those facts deemed admitted under Rule 4-501 of the Utah Code of Judicial Administration (compare R. 169-72 with R. 239-40; see R. 245). Neither Summit County nor any of the other defendants resisted FDC's motion. Bitner and Miles did not request a hearing on the motion as allowed by Rule 4-501 of the Utah Code of Judicial Administration (R. 257).

18. On August 10, 1989, the Honorable Timothy R. Hanson, district court judge, entered a minute entry ruling granting FDC's

motion for partial summary judgment for the reasons set forth in FDC's moving and reply papers (R.257). That minute entry ruling was incorporated in an order and judgment dated August 24, 1989 (R. 258-60). Judge Hanson's order and judgment declared the final tax sale, Summit County's tax deed to Bitner and all subsequent purported conveyances of the subject property invalid and void. The order and judgment also quieted title to the property in FDC as against the defendants and all persons claiming under them, and declared that "Defendants and all persons claiming under Defendants have no estate, right, title, lien or interest whatever in or to the subject property" (R. 259).

19. Miles subsequently sought and obtained an order under Rule 54(b) of the Utah Rules of Civil Procedure certifying the order and judgment of August 24, 1989 as a final, appealable judgment (R. 262-64, 274-76). This appeal, in which Miles alone appeals the order and judgment of August 24, 1989, followed.

Even though the facts recited above are conclusively established by Miles' failure to controvert them below, Miles attempts to introduce new alleged facts and inferences in her brief on appeal. Her attempt to introduce new allegations does not create a genuine issue of material fact; accordingly, the Court should not even consider those alleged facts. Nevertheless, FDC disputes the following alleged facts contained in Miles' statement of the case with appropriate citations to the record as to the true facts:

1. Contrary to Miles' assertion, there is nothing from Summit County in the record to confirm that taxes were assessed on the subject property as a separate parcel or that taxes were paid as early as 1978 (cf. Miles' brief at 7).

2. FDC does not dispute Miles' contention that FDC agreed to pay future tax assessments (Miles' brief at 7). FDC does, however, contend that it was never assessed taxes on the property, and that Summit County informed FDC that taxes could not be assessed to the property as a single unit (R. 168, 171).

3. FDC disputes Miles' statement that the title insurance policy put FDC on notice that 1979 taxes had been assessed on the property as an individual parcel (Miles' brief at 7-8). The title insurance policy was never introduced in the record below.

4. FDC disagrees that the reason Bitner did not pay taxes on the property from 1979 through 1983 was that he had quit his interest in the property (cf. Miles' brief at 8). The record does not state why Bitner did not pay the taxes even though he continued to be assessed for them. Further, the tax assessment notices Bitner received specifically state: "If property has been sold, please forward to new owner" (R. 197-200). Bitner never did so, nor did he otherwise alert FDC that taxes had been assessed (see R. 168).

5. Contrary to the suggestion in Miles' brief, Summit County did not deny, in response to FDC's motion below, having informed FDC that taxes could not be allocated to the property as a single unit (Miles' brief at 8). Summit County had previously denied so

informing FDC in response to FDC's requests for admission, but that denial was based on the fact that none of several then current county officials were aware of such a conversation with FDC (R. 183, 185). Importantly, Summit County never submitted an affidavit to controvert FDC's sworn statements about the conversation adduced in support of FDC's summary judgment motion (nor did Miles or any other party), nor did Summit County otherwise resist FDC's motion.

6. FDC disagrees with Miles' statement that Bitner was the owner of record in 1984 when he received by mail the notice of final tax sale (Miles' brief at 8). Even though Bitner continued to receive tax assessment notices after conveying the property to Burkinshaw, his quitclaim deed to Burkinshaw, as well as FDC's Notice of Contract, had already been recorded in September 1979 (R. 12, 217).

7. FDC disputes Miles' allegations that she paid taxes on the property from 1984 through 1988, and that in reliance on her clear title, she placed a dwelling on the property and has made other improvements and has been in quiet use and enjoyment of the property since 1984 (Miles' brief at 8-9). None of these allegations were supported by affidavit in response to FDC's motion for partial summary judgment; therefore, they were not considered by the court below and may not be properly considered on appeal.

8. FDC disagrees with Miles statement that Summit County indicates that the legal description in FDC's Notice of Contract is indefinite (Miles' brief at 9). As set forth on p. 40, infra, the legal description in FDC's Notice of Contract is identical to the

description in the tax assessment notices, notice of final tax sale, and tax deed (R. 182, 195-200, 210, 220). Further, Summit County did not oppose FDC's motion for partial summary judgment, nor has it appealed the order granting FDC's motion. With respect to this and the other disputed facts noted above, Miles cannot create on appeal genuine factual issues by relying on allegations that were never properly submitted in response to FDC's motion below.

VI. SUMMARY OF ARGUMENTS

Miles' brief is an impermissible attempt to reargue the motion she lost below based on new factual allegations unsupported by the record and legal arguments that she failed or chose not to raise at any time in the summary judgment proceedings below. Since these new factual allegations and legal theories could not in any way have formed the basis of the lower court's decision, Miles improperly attacks that decision as erroneous. The uncontroverted facts conclusively establish that FDC is entitled to judgment as a matter of law; therefore, the lower court's judgment in favor of FDC must be affirmed.

Even though Miles' brief is filled almost entirely with new factual allegations and legal arguments that should not be considered on appeal, those arguments additionally lack merit and in no way require reversal of the lower court's judgment. The fundamental flaw in Miles' arguments is that she fails to recognize that the requirements for a valid final tax sale, which involves a permanent "taking" of real property, are different from the

requirements for annual assessment of real property taxes. A valid final tax sale requires that every recorded interest holder whose identity is reasonably ascertainable receive notice of the sale by mail or other means as certain to ensure actual notice. Notice by mail to interest holders of record is required by the tax sale statutes, which are strictly construed in favor of the tax debtor. Such notice is also a constitutional requirement, as declared by a long line of United States Supreme Court cases.

By recording its Notice of Contract, FDC became legally entitled to notice reasonably calculated to apprise FDC of the final tax sale and afford FDC an opportunity to bid at the sale. It is undisputed that FDC never received such notice, and that it did not learn that its property had been sold until some three years after the sale. FDC was thus deprived of its property rights in violation of the tax sale statutes and without due process of law. The lower court's judgment declaring the tax sale void as a matter of law should therefore be affirmed.

Further, Miles' arguments that FDC did not do enough to entitle it to notice by mail and that, in any case, FDC should have been aware that a tax sale would eventually be held are incorrect and irrelevant. First, FDC's recorded interest in the property was sufficient to entitle FDC to notice by mail or personal service. Second, as a matter of undisputed fact, FDC was not aware that taxes had been assessed individually on its property, which was still part of a subdivision yet to be recorded. And the controlling United States Supreme Court authority holds that even

if a sophisticated interest holder of record could otherwise ascertain that property taxes are delinquent, the government must still send the recorded interest holder notice of the final tax sale by mail or equivalent means.

In addition, Miles' purported predecessor in title, defendant Bitner, was not a bona fide purchaser at the tax sale. He continued to receive tax assessment notices and received a notice of the final tax sale after he had conveyed the property away. Rather than notifying Summit County or his grantee of this error, he simply waited until the property came up for tax sale and purchased it for a fraction of its fair market value. Fairness favors FDC, which had faithfully made payments under its uniform real estate contract, but which, through a no fault of its own, did not receive notice of the tax sale until long after the sale had occurred.

The lower court correctly granted FDC's motion for partial summary judgment since there are no genuine issues of material fact. Miles failed to controvert any of the material facts set forth in the memorandum and affidavit FDC submitted to the court below. Since as a matter of undisputed fact FDC did not receive notice of the tax sale by mail or its equivalent, the lower court correctly decided, as a legal matter, that the notice of the tax sale was constitutionally inadequate. The lower court, therefore, was correct in declaring the tax sale invalid, and its judgment should be affirmed.

VII. ARGUMENT

A. The Lower Court's Order Granting Summary Judgment Should Be Affirmed Because There Is No Genuine Issue as to Any Material Fact and Plaintiff FDC Is Entitled to Judgment as a Matter of Law.

This Court has repeatedly emphasized the standard of review to be utilized in considering appeals from orders granting summary judgments:

> A grant of summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. In determining whether the trial court properly found that there was no genuine issue of fact, we view the facts and inferences therefrom in a light most favorable to the losing party. And in deciding whether the trial court properly granted judgment as a matter of law to the prevailing party, we give no deference to the trial court's view of the law; we review it for correctness.

Utah State Coalition of Senior Citizens v. UP&L Co., 776 P.2d 632, 634 (Utah 1989) (citations omitted). Applying this standard of review to the facts of this case, this Court should affirm the lower court's order granting summary judgment. There is no genuine issue as to any material fact based upon appellant Miles' failure below to contest the facts FDC asserted in support of its motion, and FDC is entitled to judgment as a matter of law.

1. Summary Judgment Was Properly Entered Since There Is No Genuine Issue as to Any Material Fact.

In the proceedings below, Miles failed or chose not to comply with Rule 56(e) of the Utah Rules of Civil Procedure and Rule 4-501 of the Utah Code of Judicial Administration in contesting facts

offered by FDC in support of its motion for summary judgment. Thus, in considering on appeal whether any genuine issue of material fact exists, this Court should only consider the statement of facts contained in the memorandum in support of FDC's motion for summary judgment. As this Court stated in Busch Corp. v. State Farm Fire and Casualty Co., 743 P.2d 1217 (Utah 1987):

> Rule 56(e) of the Utah Rules of Civil Procedure provides in part:
>
> > Further, when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.
>
> The language of this rule is clear. Indeed, we have previously held:
>
> > [W]hen a party opposes a properly supported motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials allowed by Rule 56(e), the trial court may properly conclude that there are no genuine issues of fact unless the face of the movant's affidavit affirmatively discloses the existence of such an issue. Without such a showing, the Court need only decide whether, on the basis of the applicable law, the moving party is entitled to judgment.

Id. at 1219 (quoting Franklin Financial v. New Empire Development Co., 659 P.2d 1040, 1044 (Utah 1983)); accord, Insley

Manufacturing Corp. v. Draper Bank and Trust, 717 P.2d 1341, 1347 (Utah 1986).

Accordingly, "[w]hen a motion for summary judgment is filed and supported by an affidavit, the party opposing the motion has an affirmative duty to respond with affidavits or the materials allowed by Rule 56(e)." DNL Supply v. Saurini, 775 P.2d 420, 421 (Utah 1989). A party is not permitted to rely on allegations in its pleadings to defeat a motion for summary judgment and Miles' failure to submit an affidavit below precludes her from claiming on appeal that genuine issues of material fact exist.

Applying these principles of law to the facts of this case demonstrates the correctness of the lower court's decision. In support of its motion for summary judgment, FDC submitted the uncontroverted affidavit of its president, Clarence A. Persch, evidencing the following facts: FDC executed a uniform real estate contract for the purchase of the subject property on September 13, 1979. FDC recorded its Notice of Contract in the office of the Summit County Recorder on September 18, 1979 (R. 167, 169-70). FDC made regular payments under the contract until the purchase price of $18,550 was paid in full (R. 167, 170). Even though FDC had not received a tax assessment notice on the property, FDC dutifully contacted the Summit County Assessor's office to inquire about assessment and payment of property taxes. In response, Summit County personnel informed FDC that FDC could not pay taxes on its individual parcel because the subdivision of which the property is a part had not been completed and filed. Summit County therefore

could not allocate a portion of the total tax liability on the entire subdivision to FDC's property as a single unit (R. 168, 171). FDC never received notice of tax assessments on the property. In spite of its recorded interest, FDC never received notice by mail, personal service or otherwise of the final tax sale of the property as required by statute and the United States Constitution (R. 168, 171-72, 184). As discussed below, this defect in notice given of the tax sale rendered the tax sale invalid as a matter of law.

Since Miles chose not to file any affidavits to controvert any of these factual averments, the trial court could properly disregard the unsupported statements in Miles' memorandum in opposition to FDC's motion. For the same reason, this Court should conclude that there were no genuine issues of fact presented in the proceedings below. See Busch Corp. v. State Farm Fire & Casualty Co., supra, 743 P.2d at 1219.

In addition to failing to submit affidavits in response to the affidavit that FDC submitted in support of its summary judgment motion, Miles also chose not to comply with Rule 4-501 of the Utah Code of Judicial Administration in her opposition to FDC's motion.

Rule 4-501(5) of the Utah Code of Judicial Administration (1988) provides:

> The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall refer with particularity to those portions of the record

> upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing parties' statement.[2]

(Emphasis added.)

Under this rule, the facts set forth in the statement of facts contained in the memorandum supporting FDC's motion are conclusively established because Miles chose not to controvert them specifically in her opposing memorandum. Accordingly, Miles should not be allowed on appeal to alter the statement of those facts, which establish FDC's entitlement to judgment as a matter of law.

2. The Court Should Summarily Dismiss Appellant Miles' New Arguments On Appeal and Affirm the Lower Court's Judgment

Miles' arguments on appeal were not raised below and thus should not be considered by this Court in determining whether the lower court correctly granted summary judgment in favor of FDC. As this Court has repeatedly stated in cases involving appeals from the entry of summary judgment:

> [W]hen an argument has not been made in the trial court, we will not allow it to be raised on appeal.
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> > For a question to be considered on appeal, the record must clearly show that it was timely presented to the trial court in a manner sufficient

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[2] This rule is substantially identical to Rule 4-501(2)(b) of the Code of Judicial Administration, amended effective January 15, 1990.

> to obtain a ruling thereon; we cannot merely assume that it was properly raised. The burden is on the parties to make certain that the record they compile will adequately preserve their arguments for review in the event of an appeal.

Busch Corp. v. State Farm Fire & Casualty Co., supra, 743 P.2d at 1219 (citing Insley Manufacturing Corp. v. Draper Bank and Trust, supra, 717 P.2d at 1347; and quoting Franklin Financial v. New Empire Development Co., supra, 659 P.2d at 1045). Thus, "[i]t is axiomatic that defenses and claims not raised by the parties in the trial cannot be considered for the first time on appeal." Bangerter v. Poulton, 663 P.2d 100, 102 (Utah 1983) (citations omitted).

The lower court considered FDC's arguments that the notice of final tax sale was statutorily and constitutionally defective and that FDC was entitled as a matter of law to an order declaring the tax sale void. Miles chose to respond to those arguments merely by raising two equitable arguments. She did not raise any of her arguments on appeal, including her arguments concerning the interpretation of Utah statutes governing tax sale notices and the constitutional adequacy of notice to FDC, until this appeal. Under the authorities cited above, Miles' arguments on appeal should not be considered and the lower court's judgment should be summarily affirmed. See Busch Corp. v. State Farm Fire & Casualty Co., supra, 743 P.2d at 1219.

B. The Lower Court's Judgment Should be Affirmed Because FDC, An Interest Holder of Record, Did Not Receive Notice of the Tax Sale as Required By Utah Statutes, and the Sale was Consequently Invalid.

Miles' first argument on appeal was never raised in the proceedings below, and therefore should be dismissed summarily as falling outside the scope of this Court's review. In addition, her argument lacks merit.

Miles contends that the lower court erred in interpreting the Utah statutes governing the notice requirements for a tax sale. Miles also baldly asserts that FDC did not take sufficient steps to assure that it would be assessed taxes on the subject property, claiming that FDC was not entitled to notice of the tax sale because it had not been assessed taxes.

Miles' argument is fundamentally flawed for two principal reasons. First, there is no indication that the lower court interpreted any of the statutes cited by Miles in arriving at its conclusion that the tax sale was invalid (See R. 257-60). Miles did not rely on any of those statues in the proceedings below; she should not be allowed to raise the issue of statutory interpretation for the first time on appeal. Second, Miles' position unreasonably limits the persons entitled to notice of a final tax sale to those who have already received notice that taxes are delinquent.[3] As set forth below, Miles has erroneously failed

[3] As applied to the facts of this case, Miles' reasoning is circular: if FDC had received notice of any tax assessment, FDC would have paid the taxes assessed and there would not have been a tax sale. The uncontroverted affidavit of Clarence A. Persch establishes that FDC attempted unsuccessfully to pay any taxes

to differentiate between entitlement to notice of tax assessment and entitlement to notice of final tax sale. As a matter of law, FDC was entitled to notice of the final tax sale under Utah statutes.

1. Statutes Governing Tax Sales Are Strictly Construed In Favor of The Taxpayer.

This Court has consistently applied the rule of strictissimi juris to tax sale procedures. See, e.g., Salt Lake Home Builders, Inc. v. Colman, 518 P.2d 165 (Utah 1974); Page v. McAfee, 26 Utah 2d 208, 487 P.2d 861 (1971); Tintic Undine Mining Co. v. Ercanbrack, 93 Utah 561, 74 P.2d 1184 (1938). In order for a tax sale to be valid to convey title, the statutes governing the sale must be strictly followed. For example, in Salt Lake Home Builders, Inc. v. Colman and Page v. McAfee, supra, this Court overturned tax sales that were conducted by employees of county auditors because the employees had not been duly deputized.

The Salt Lake Home Builders Court declared:

> [T]he main purpose of all of the taxing procedures is to enforce the payment of taxes, and not the confiscation of property. Although it is true that confiscation may be the final and drastic measure, it should result only as the ultimate necessity to the accomplishment of the main objective. It is evident that that is the intent of our statutes; and consistent therewith it is also the practically universal rule of decisional

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owing on the property (R. 168). It strains credulity to conclude that FDC would have allowed the property to be sold for some six hundred dollars ($600.00) in back taxes at about the same time it was paying nearly twenty thousand dollars ($20,000.00) to purchase the property.

> law: that the sovereign (taxing authority) is required to follow procedures prescribed by law with accuracy and particularity before it can forfeit one's property.

518 P.2d at the 168 (footnote omitted).

In Fivas v. Peterson, 5 Utah 2d 280, 300 P.2d 635 (1956), this Court addressed a flaw in a tax sale procedure that was even more serious than the defect in the Salt Lake Home Builders and Page cases cited above. In Fivas, the Court reversed a judgment quieting title in purchasers of property at a tax sale as against the previous owners who had failed to pay taxes on the property because the previous owners had never received notice of tax assessments or of the final tax sale. The purchasers contended that an amendment to the tax notice statutes had shifted the burden to taxpayers to ascertain and pay taxes when due, whether they received notice of assessment or not. In response, the Court stated:

> In considering the above contention, it is necessary to keep in mind the fundamental principles which have been established since time immemorial underlying adjudications on tax titles. The forfeiture of one's property for the nonpayment of taxes has always been regarded as a harsh procedure, which may work great hardships on property owners. An awareness of this fact invariably pervades the decisions in such cases, with the result that, in the interpretation and application of statutory requirements antecedent to forfeiture of property, they are construed in favor of the taxpayer and against the taxing authority, and are strictissimi juris. These rules are basic to taxation law.

Id., 300 P.2d at 637 (footnotes omitted); see Fredricksen v. LaFleur, 632 P.2d 827, 828 (Utah 1981).

The consistent decisions of this Court make it clear that statutes governing tax sales, which operate as a forfeiture of the taxpayer's property, must be construed narrowly and in favor of the tax debtor.

2. Utah Statutes Require that Notice of Final Tax Sales Be Sent to All Interest Holders of Record.

Utah Code Ann. § 59-2-1351 (Supp. 1990) sets forth the procedural requirements for final tax sales. Subsection 2 of that section, which is substantially the same as its predecessor statute in effect at the time of the tax sale in 1984, provides for the giving of notice of final tax sale:

> (2) Notice of final tax sale shall be published four times in a newspaper published and having general circulation in the county, once in each of four successive weeks immediately preceding the date of sale. If no newspaper is published in the county, the notice shall be posted in five public places in the county, as determined by the auditor, at least 25 but no more than 30 days prior to the date of sale. Notice of sale shall also be sent by certified mail to the last known recorded owner and all other recorded lienholders, according to the deed, as of the preceding March 31, at their last-known address. In the case of the sale of the total parcel of property, unrecorded or unnotified lienholders may assert their liens against unclaimed property to the extent that money is available to satisfy the liens.

(Emphasis added.)

The obvious purpose of this statute is to apprise all interest holders of record that the property will be sold to satisfy delinquent taxes.

In its earlier form in effect at the time of the tax sale, Utah Code Ann. § 59-10-64(1) (1953), this statute required that notice be sent by mail only to the last known recorded owner. The amendment does not broaden the statute's original purpose, to give notice of the tax sale to interested parties of record, as declared by long-standing decisions of this Court. See Fivas v. Petersen, supra, 300 P.2d at 639; Olsen v. Bagley, 10 Utah 492, 37 P.734 (1894). Rather, the amendment merely attempts to codify the constitutionally mandated requirements for notice. See Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983); Mullane v. Hanover Bank and Trust Co., 339 U.S. 306 (1950).[4]

In Fivas v. Petersen, supra, the Court emphasized the importance of giving statutory notice:

> So far as the taxpayer is concerned, the giving of notice is the most critical aspect of the procedure which looks toward the forfeiture of his property. An elemental requisite of deprivation of one of his property by process of law is notice in some manner.

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[4] Further, FDC was the recorded equitable owner of the property at the time of the final sale. Bitner, who received notice by mail of the tax sale, certainly was not the owner of record because his quitclaim deed to Burkinshaw and Burkinshaw's contract with FDC were recorded long before the sale. If Summit County had even sent notice by mail to Burkinshaw, FDC may have been apprised of the sale because FDC was in privity with Burkinshaw, the seller under the UREC. Cf. Mennonite Board of Missions v. Adams, supra, 462 U.S. at 799 (notice to party not in privity with interested party was insufficient). It is undisputed that Summit County failed to comply strictly with the statute in either form because it sent notice of the final tax sale to the wrong person. That defect renders the tax sale invalid as a matter of law.

Id., 300 P.2d at 639. The Court went on to hold that the county's failure to meet the statutory notice requirement invalidated the final tax sale. See also Olsen v. Bagley, 10 Utah 492, 37 P. 739 (1894) (failure to give statutory notice is not a mere irregularity, but a jurisdictional defect).

Here, Summit county failed to comply strictly with the statutory tax sale procedure in that it failed to send notice of the tax sale by certified mail to FDC, the recorded equitable owner of the property. In light of the authorities cited above, the lower court was therefore correct in determining that the tax sale was invalid.

3. As a Matter of Undisputed Fact, FDC Met the Statutory Requirements for Entitlement to Notice of the Final Tax Sale.

As set forth above, FDC recorded its interest in the subject property with the Summit County Recorder on September 18, 1879. That is all FDC was required to do in order to be entitled to notice that the property would be sold to satisfy delinquent taxes.

For the first time on appeal, Miles contends that FDC should have filed a formal request with the Summit County Assessor to receive tax assessment notices. Since FDC did not do so, she reasons, it was not entitled to notice that its recorded interest would be extinguished in the eventual tax sale of the property. Miles' position not only ignores the statutory requirement for receiving notice, see Fivas v. Petersen, supra, 300 P.2d at 637 (tax notice statutes do not shift the burden to the taxpayer to ascertain and pay taxes when due regardless of whether notice is

mailed to the taxpayer), with which FDC complied, but it also impermissibly disregards the uncontroverted facts contained in the record below.

The record is clear that in addition to recording its interest, FDC sought to pay property taxes even though it had not received an assessment notice from the County, and contacted the Summit County Assessor's office to do so. In response to FDC's inquiries, Summit County erroneously informed FDC that FDC could not pay the taxes because taxes were not allocable to the property as an individual unit (R. 168, 171).[5] Miles now contends that FDC should not have relied on this information, and should have done much more. In essence, Miles is saying that FDC should have second-guessed the constituted governmental authority responsible for assessing and collecting taxes on the property, and that FDC's failure to do so somehow nullified its statutory entitlement to notice of the tax sale. That contention is patently absurd.

FDC cannot be faulted for relying on misinformation it received from Summit County. Importantly, Summit County did not resist FDC's motion for partial summary judgment in the proceedings below, and none of the other parties below controverted FDC's

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[5] Miles did not attempt to controvert these facts, which were set forth in a sworn affidavit, in the proceedings below. In response to a request for admission, Summit County initially denied the conversations referred to for lack of information (R. 183, 185). But it subsequently determined not to refute FDC's affidavit or otherwise oppose FDC's motion for partial summary judgment. Since Miles did not file any counter-affidavits below, the Court should summarily dismiss her present attempt to bootstrap a factual issue into existence by relying on Summit County's initial defense of this lawsuit.

averments regarding its good faith attempts to pay taxes on the property.

In light of the undisputed facts, FDC was entitled to statutory notice of the final tax sale, and it did not lose that entitlement by purportedly failing to take all of the steps necessary to receive notice of previous tax assessments. See Fivas v. Petersen, supra.

4. Miles Improperly Confuses the Notice of Tax Assessment With the Notice of Final Tax Sale, Which Must be Sent to All Recorded Interest Holders.

Miles contends that only those who are entitled to notice of property tax assessment (who, she asserts, are exclusively legal title holders and persons formally requesting such notice) are entitled to notice of the final tax sale. Miles reasons that since FDC did not hold legal title to the property, Utah statutes did not allow it to receive notice of the final tax sale unless it had made a formal request to the Summit County Assessor for notice of tax assessments. In support of this argument, Miles cites several statutes regarding the respective duties of the county recorder, county assessor and county treasurer.

Miles' argument lacks merit in that it fails to recognize the fundamental distinction between notice of tax assessment and notice that the property will be sold to satisfy delinquent taxes. The former does not require publication because only those who are legally responsible to pay the taxes need to be advised that they are due. See Dillman v. Foster, 656 P.2d 974, 977 (Utah 1982) (payment of property taxes is a personal obligation of the one

assessed). The latter requires publication as well as notice by mail to all recorded lienholders to give all interested parties an opportunity to protect their interests in the property from the harsh results of forfeiture. See Fivas v. Peterson, supra; Utah Code Ann. § 59-2-1351(2) (Supp. 1990).

Further, the statutes Miles cites with respect to the duties of various county officials all pertain to the assessment of taxes, not the sale of property to satisfy delinquent taxes. Miles' reliance on those statutes is therefore misplaced.

Miles also relies on Fivas v. Petersen, supra, to excuse county assessors for looking only to the information they receive from county recorders in determining to whom they will send tax assessment notices. The conclusion Miles draws from Fivas ignores the holding of that case, that the tax sale was invalid because the county failed to take adequate steps to send notice to the taxpayer, whose interest was of record. 300 P.2d at 638-40. Moreover, the Court said that if the county recorder, assessor and treasurer collectively fail to perform their duties, their failure is chargeable to the county itself. Id, at 637. Consequently, it is immaterial that FDC recorded its interest with the Summit County Recorder rather than filing a formal request for tax assessment notices with the Summit County Assessor. The county as a whole had a duty to send notice of the final tax sale to FDC because of FDC's recorded interest in the property.

Miles has improperly confused the notice requirements for tax assessments with the notice requirements for final tax sales. The

statutes and cases upon which Miles relies are inapposite because the only relevant issue is whether FDC should have received, and did receive, notice of the final tax sale, not whether FDC was entitled to annual notice of tax assessments.

C. The Lower Court's Judgment Declaring the Final Tax Sale Void Should Be Affirmed Because FDC Did Not Receive Adequate Notice of the Sale as Required by Due Process.

Miles second argument, that FDC received constitutionally adequate notice of the final tax sale of the subject property, should be dismissed summarily for being raised for the first time on appeal.[6] In addition, the argument is without merit and ignores established case law setting forth the due process requirements for adequate notice.

1. Relevant United States Supreme Court Decisions Mandate That Notice By Mail or Equivalent Means Be Given to All Reasonably Ascertainable Interested Parties.

Miles claims that notice by publication in a newspaper circulated solely in Summit County, as well as notice by certified mail to Bitner, the purported owner of record, constituted sufficient notice to FDC for purposes of due process (see Miles' brief at 16-17). That contention flies in the face of numerous United States Supreme Court decisions interpreting the Due Process

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[6] To bolster her argument, Miles relies on a document (Exhibit "A" attached to Miles' brief) that was never made part of the record below. As explained in footnote 8, infra, that document, a title insurance policy issued to FDC with respect to the property, has no bearing on whether FDC received adequate notice of the tax sale. Nevertheless, since the document was never considered by the lower court, this Court should decline to include it in the Court's review of the lower court's decision.

Clause in relation to notice requirements before a constitutional "taking." See, e.g., Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983); Schroeder v. New York City, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956); Mullane v. Central Hanover Trust Co. 339 U.S. 306 (1950).

Miles cites two of these cases, Mennonite Board of Missions and Mullane, but attempts to distinguish them factually. Miles' attempted distinctions do not diminish the force of the paramount principles enunciated in those decisions and, in fact, those principles have direct application to the facts of this case.

In Mullane, the seminal decision on the notice requirements of due process, the Court struck down a New York banking law governing judicial settlement of accounts with respect to a common trust fund. Pursuant to that law, the trustee notified beneficiaries of the judicial proceeding, which potentially could have cut off the beneficiaries' rights against the trustee for mismanagement, only by publication in a local newspaper. 339 U.S. at 309-11. The Court held that such notice was insufficient for due process purposes where the names and addresses of the beneficiaries were known. Id. at 319-20.

The Court defined constitutionally adequate notice of a proceeding affecting property interests as "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id. at 314 (citations omitted). Newspaper publication alone is insufficient:

> It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. . . . Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.

Id. at 315.

The constitutional principles expressed in Mullane have direct application here. The tax sale in May 1984 operated to deprive FDC of its equitable interest in the subject property, for which it had paid some twenty thousand dollars. See Bill Nay & Sons Excavating v. Neeley Construction, Co., 677 P.2d 1120, 1121 (Utah 1984) (purchaser under a real estate contract has an equitable interest in the property); cf. Mennonite Board of Missions v. Adams, supra, 462 U.S. at 798 (mortgagee has a legally protected interest, and is entitled to notice of a pending tax sale). FDC was an identifiable interested party because its name and address appeared on the face of the Notice of Contract recorded in the office of the Summit County Recorder. Notice by publication in a Summit County newspaper was not reasonably calculated to apprise FDC, a resident of Salt Lake County, of the pendency of the tax sale; in fact, FDC had no notice of the tax sale until more than three years after it was held. Under Mullane and its progeny, the notice of the tax sale was constitutionally insufficient. Consequently, the tax sale

was invalid, and the lower court's decision so holding should be affirmed.[7]

Further, Miles' attempt to distinguish Mullane fails. In dictum, the Mullane Court said that "publication traditionally has been accepted as notification supplemental to other action which in itself may reasonably be expected to convey a warning." Id. at 316. When a governmental entity seizes or enters upon tangible property, that action "may reasonably be expected to come promptly to the owner's attention, . . . [and] publication or posting affords an additional measure of notification." Id. Here their was no noticeable "direct attack" on FDC's property interest; Summit County did not physically enter upon the property or post notification on it. It was therefore highly improbable that FDC would be apprised of the pending tax sale by publication alone. In addition, the Court's subsequent decision in Mennonite Board of Missions makes no distinction between interests in tangible and intangible property.

In Mennonite Board of Missions v. Adams, supra, the United States Supreme Court followed Mullane in reversing a judgment that

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[7] Miles also contends that notice by certified mail to Bitner, "the owner of record," satisfied due process requirements (see Miles brief at 16-17). It would be naive to assume that Bitner, who received notice of tax assessments for five years after he had conveyed the property to Burkinshaw, and who eventually repurchased the property at the tax sale for a fraction of its value, would inform FDC of the pending tax sale. Therefore, the notice by mail to Bitner was not reasonably calculated to reach FDC as required by due process. Cf. Mennonite Board of Missions v. Adams, supra, 462 U.S. at 799 (notice to property owner, who is not in privity with his creditor, cannot be expected to lead to notice to mortgagee).

had upheld the Indiana tax sale statute against the challenge of a mortgagee of record that had not received notice of the tax sale of the mortgaged property. Pursuant to the Indiana statute, the owner of record received notice of the tax sale by certified mail, but the only other notice given was by publication in a local newspaper and posting in the county courthouse. The mortgagee, whose interests were extinguished by the tax sale, did not receive actual notice of the sale until long after it took place. The Supreme Court held that the statutory notice by publication and by mail to the owner of record alone did not meet the requirements of due process. See 462 U.S. at 800. Such notice by itself it not reasonably calculated to reach interested parties. The Court went on to state:

> Notice by mail or other means as certain to ensure actual notice is a minimum constitutional pre-condition to a proceeding which will adversely affect the liberty or property interests of any party. . . if its name and address are reasonably ascertainable.

Id. (emphasis in original).

In this case, the minimum constitutional pre-condition to the validity of the final tax sale, which adversely affected FDC's property interests, was not met. FDC was never served by mail or other means as certain to ensure actual notice even though FDC's name and address were reasonably ascertainable from the recorded Notice of Contract. That defect in the notice given of the tax sale deprived FDC of its interests without due process of law. See also Fivas v. Petersen, supra, 300 P.2d at 634-40. The lower court was therefore correct in declaring the tax sale, the tax deed to

Bitner and Bitner's subsequent purported conveyance to Miles invalid.

Mennonite Board of Missions is on all fours with this case, and Miles' attempted distinction is meritless. Miles argues that the mortgagee in Mennonite Board of Missions "was at the mercy of the property owner to pay the taxes on the property," and that the owner's failure to pay the taxes entitled the mortgagee, which otherwise "would not be aware of any arrearage or tax sales," to personal or mailed notice. Miles' brief at 18-19. Here, Miles contends that FDC was responsible to pay taxes on the property, and that FDC's failure to do so, not the failure of any third party, caused the property to be sold at the tax sale.

Miles' attempted distinction ignores the holding of Mennonite Board of Missions. Apparently, in response to an argument that the mortgagee in that case should have taken steps to determine whether property taxes were delinquent and a tax sale pending, the Court said:

> Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax sale proceedings are therefore likely to be initiated. In the first place, a mortgage need not involve a complex commercial transaction among knowledgeable parties, and it may well be the least sophisticated creditor whose security interest is threatened by a tax sale. More importantly, a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation. It is true that particularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience or incompetence. . . . But it does not follow

> that the State may forgo [sic] even the relatively modest administrative burden of providing notice by mail to parties who are particularly resourceful.

462 U.S. at 799-800 (citations and footnote omitted; emphasis added). Therefore, the constitutional pre-condition of adequate notice to FDC, a recorded interest holder, cannot be foregone merely because FDC allegedly did not take sufficient steps to protect its own interest in the property. Miles' position impermissibly attempts to shift the burden to the taxpayer to ascertain whether and when a final tax sale will be held. See Fivas v. Petersen, supra, 300 P.2d at 637.

Further, as pointed out above, FDC did take steps to safeguard its interest in the property by recording the Notice of Contract. That was sufficient to entitle FDC to personal or mailed notice of the tax sale under the Utah tax sale statutes as well as Mennonite Board of Missions and Mullane. And FDC did attempt to pay taxes on the property, for which it had not been assessed, but without success. The failure to send notice here was not FDC's, but Summit County's; therefore, Miles' contention that Mennonite Board of Missions is distinguishable because it involved the failure of a third party, rather than the party entitled to notice, must fail.

Importantly, Bitner, Miles' immediate predecessor in interest, was also responsible for the County's failure to apprise FDC of the tax sale. For five years after Bitner had conveyed the property to Burkinshaw, Bitner continued to receive tax assessment notices (R. 195-99). The notices Bitner received for at least three of those

years, 1981 to 1983, state: "If property has been sold, please forward to new owner" (R. 197-99).

Bitner evidently knew that FDC was purchasing the property under a real estate contract because Bitner and his wife executed a new quit claim deed to Burkinshaw on September 13, 1979. That was the same day the UREC was executed, nearly a year after Bitner had originally quitclaimed the property to Burkinshaw. Both the new quitclaim deed and FDC's Notice of Contract were recorded five days later at the request of Granite Title Company (see R. 182, 217). The Court may reasonably infer that Granite Title handled FDC's purchase of the property from Burkinshaw, and that Granite Title required Bitner to execute the new quitclaim deed in order to establish in the record the chain of title from Bitner to FDC.

Bitner's failure to forward the tax assessment notices or notice of tax sale to FDC, or even to alert Summit County that he no longer had any interest in the property, is inexcusable. In light of FDC's unsuccessful attempt to obtain notice of tax assessments from Summit County, FDC was "at the mercy" of Bitner, who chose not to inform FDC or Summit County of the County's mistake. These facts emphasize that Mennonite Board of Missions is controlling here, and Miles' attempted distinction of the case is meaningless.[8] Consequently, the Court should follow that case in

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[8] With respect to the constitutional sufficiently of notice to FDC, Miles again confuses the respective requirements for notice that taxes are due and notice that the property will be sold to satisfy delinquent taxes. She claims that FDC had notice that taxes would be assessed on the property, relying on, among other things, provisions in the UREC regarding payment of taxes and a reference to the assessment of taxes in the title insurance policy

affirming the lower court's ruling that constitutionally inadequate notice rendered the tax sale invalid.

2. Fairness Requires That Plaintiff FDC Should Not Be Deprived of Its Property Interest Without Due Process of Law in Favor of Dedant Miles and Bitner, Her Predecessor in Interest, Who Were Not Bona Fide Purchasers For Value.

As set forth above, FDC was deprived of its due process rights because it did not receive notice of the tax sale at which its property was sold. Bitner knew that FDC owned the property, or at the very least that he no longer owned the property, and yet he never informed FDC or Summit County that he was erroneously continuing to receive tax assessment notices. Rather, he waited until the final tax sale, of which he received notice by certified mail, and then purchased the property for a small percentage of its value. Shortly thereafter he quitclaimed the property to Miles.

In Dillman v. Foster, 656 P.2d 974 (Utah 1982), this Court held that record owners of property could not strengthen their title as against subsequent transferees by paying at a tax sale the taxes they were obligated, but had failed, to pay previously. The Court placed the burden on record owners who transfer their interests in property "to make appropriate arrangements for payment by [their transferees]." Id. at 977.

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issued by Granite Title Company. But such purported notice is irrelevant to whether Summit County discharged its constitutional obligation to advise FDC that the property would be sold to satisfy back taxes. See Mennonite Board of Missions v. Adams, supra, 462 U.S. at 800. A recorded interest holder's knowledge that tax payments are delinquent is fundamentally different from knowledge that a tax sale, where those property interests will be affected, is pending. See id.

Under Dillman, Bitner was obligated either to pay the taxes he was erroneously assessed or to make arrangements to have them paid by his transferee, Burkinshaw. Accordingly, Bitner's purchase of the property and subsequent conveyance to Miles should not be dignified by the tax sale statutes when he took no affirmative steps to correct Summit County's error in continuing to send him tax assessment notices. This is especially true in view of FDC's good faith efforts to protect its recorded interest and pay any taxes that were allocable to the property, and FDC's payment of full value for the property under the UREC.

In Fivas v. Petersen, supra, this Court considered such equities in overturning an invalid tax sale. The court held that it would be unfair to allow the tax title holders to retain the benefits of an inequitable bargain since they purchased the property for much less than its value. The Court reasoned that the unfairness would be minimized if the sale were overturned because the only loss would be the relatively small consideration the tax title holders had paid for the property; moreover, purchasers of an invalid tax title have a lien for such consideration. 300 P.2d at 639-40; see Utah Code Ann. § 59-2-1352 (Supp. 1990). Therefore, fairness requires that the defective tax sale to Bitner, who did not purchase in good faith, should be overturned in favor of FDC, which acted in good faith and yet was deprived of its property interest without due process of law.

D. The Purported Factual Issues Raised By Miles On Appeal Do Not Defeat FDC's Entitlement to Summary Judgment.

As set forth above, this Court's review of the lower court's decision must be confined to the facts before that court as contained in the record below. An appellant who fails or chooses not to controvert facts set forth by way of affidavit in connection with a motion for summary judgment cannot on appeal reach outside the record to conjure up issues of fact that were never raised below. See Busch Corp. v. State Farm Fire & Casualty Co., supra.

Miles impermissibly attempts to contrive three such purported factual issues, and in so doing seeks the Court's indulgence in going beyond the ordinary scope of its review. First, Miles claims that a factual issue exists as to whether FDC received adequate notice of the final tax sale.[9] However, it is undisputed that FDC was an interest holder of record and that it never received notice by mail or personal service of the pending tax sale. Under the authorities cited above, those uncontroverted facts are sufficient to establish the invalidity of the final tax sale as a matter of

[9] Miles asserts that language contained in the UREC and the title insurance policy (which was not part of the record below) gave FDC adequate notice that taxes would be assessed on the property and that the property eventually would be sold for delinquent taxes. As established above, such "notice" is not equivalent to notice that a tax sale is pending, for which notice by mail or other means as certain to ensure actual notice is a minimum constitutional requirement. Mennonite Board of Missions v. Adams, supra, 462 U.S. at 800. Therefore, Miles' contention that FDC should have been aware that the property would be sold at some future date if FDC did not pay the taxes on the property (for which it was never assessed) is entirely irrelevant and does not present a genuine issue of material fact.

constitutional and statutory law. See Mennonite Board of Missions v. Adams, supra.

Accordingly, this Court does not need to reach the second purported factual issue, whether FDC made an adequate attempt to pay taxes on the property. The critical legal issues are whether FDC was entitled to notice of the final tax sale and, if so, whether FDC received adequate notice as a matter of constitutional and statutory law. All of the facts necessary to support the lower court's resolution of those issues in FDC's favor are uncontroverted. The purported factual issue as to whether FDC's attempts to pay taxes (for which it was not even assessed) were adequate was immaterial to the lower court's judgment.[10]

The third purported factual issue Miles raises is whether the legal description in FDC's recorded Notice of Contract was sufficient to allow Summit County to send notice to FDC of the final tax sale. Miles raises this purported issue for the first time on appeal, and the Court should reject it summarily. Further, this is not really a factual issue, but requires only a legal conclusion as to whether the Notice of Contract identifies the property with "reasonable certainty." Cf. Park West Village, Inc. v. Arise, 714 P.2d 1137, 1141 (Utah 1986) (street address in lease option was sufficiently definite description of property); Colman v. Butkovich, 556 P.2d 503, 505 (Utah 1976) (court looks to deed

[10] Additionally, neither Miles nor Summit County ever challenged below the affidavit of FDC's president stating that Summit County told FDC it could not allocate taxes to the individual parcel FDC was purchasing. Summit County chose not to resist FDC's motion for partial summary judgment.

itself to determine whether it identifies property with reasonable certainty).

A comparison of the legal descriptions contained in FDC's recorded Notice of Contract (R. 182), the tax assessment notices and notice of final tax sale (see R. 195-200, 220) and the tax deed to Bitner (R. 210) reveals that, except for an easement that is not pertinent here, the descriptions are identical.[11] Thus, even if an issue as to the adequacy of the legal description in FDC's Notice of Contract had been raised below, the lower court correctly could have concluded, as a matter of law, that FDC's interest was sufficiently recorded so as to entitle it to notice by mail of the final tax sale.[12]

For these reasons, even when the Court views the facts in the light most favorable to Miles, there still exists no genuine issue

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[11] Miles relies on Summit County's initial statement that the reference in FDC's Notice of Contract to "Lot 5, Stagecoach Estates Plat 'C'" was indefinite (see Miles' brief at 20). That statement, however, was incorrect. Summit County had used the same reference in its tax assessment notices and the tax deed to Bitner (R. 195-200, 210, 220). The same is true of the metes and bounds description in FDC's Notice of Contract. However "vague and indefinite" the description in FDC's Notice of Contract may be, it is the same description used in the tax assessment notices, notice of final tax sale and tax deed. Significantly, Summit County did not oppose FDC's motion for partial summary judgment.

[12] As a parting shot, Miles alludes to the "length of time that elapsed prior to bringing this action" (Miles brief at 22). Her statement is not only completely irrelevant to this appeal since she did not raise it below as an issue of material fact, it is also untrue. Miles makes an unsupported assertion that FDC made no attempt to contact her until it filed this lawsuit in 1988. However, in 1987 immediately after FDC learned that Miles was asserting possessory rights to the subject property, FDC made a written demand that she vacate the property. She failed to do so, and FDC filed this lawsuit several months later (See R. 6).

of material fact precluding summary judgment. The lower court's 2entry of summary judgment should be affirmed.

VIII. CONCLUSION

For the reasons stated above, the lower court correctly concluded that FDC was entitled to notice of the final tax sale and that Summit County's failure to give FDC statutorily and constitutionally adequate notice of the sale rendered the sale void.[13] The facts supporting the lower court's conclusion are uncontroverted, and the law, which Miles did not question below, is clear. The Court should summarily dismiss the arguments and purported factual issues that Miles seeks to raise for the first time on appeal. Further, those arguments and purported issues lack merit and do not change the fact that FDC was constitutionally shortchanged, while Bitner, who did not act in good faith, and Miles, his successor in interest, received a windfall. In light of the established legal precedent cited above, as well as principles

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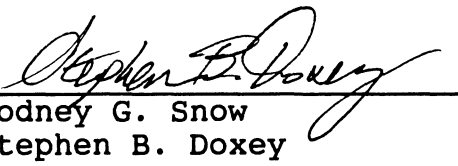
[13] Consequently, Bitner did not receive valid title to the property and did not convey valid title to Miles. Their interests, if any, are inferior to FDC's. See Dillman v. Foster, supra, 656 P.2d at 978-79. The "paramount" tax title Miles claims, citing Hansen v. Burris, 86 Utah 424, 46 P.2d 400 (1935), only vests when a valid tax title is purchased. See Dillman v. Foster, supra, 656 P.2d at 978-79.

of justice and fair play, the Court should affirm in all respects the lower court's judgment.

RESPECTFULLY SUBMITTED this 18th day of July, 1990.

CLYDE, PRATT & SNOW



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CERTIFICATE OF SERVICE

I hereby certify that I mailed four copies of the foregoing Brief of Appellee to Ronald C. Wolthuis and David O. Black, HATCH, MORTON & SKEEN, Attorneys for Defendant-Appellant, Ann P. Miles, at 1245 Brickyard Road, Suite 600, Salt Lake City, Utah 84106 on this 18th day of July, 1990.

Stephen B. Doxey

STEPHEN B. DOXEY

Appendix A

59-10-64. Sales by county.—(1) Upon receiving the tax sale record from the county treasurer, the county auditor shall immediately advertise for sale during the month of May all real estate sold to the county at preliminary sale and not previously redeemed or sold at private sale as provided in section 59-10-37 and upon which the period of redemption expired upon March thirty-first next preceding.

Notice of sale shall be published in a newspaper published in the county and having general circulation therein, four times, once in each of four successive weeks immediately preceding the date of sale, or if no such newspaper is published in the county, by posting such notice in five public places in the county, as determined by the auditor, at least twenty-five and no more than thirty days prior to the date of sale. Notice of sale shall also be sent to the last known recorded owner at his last known address by registered mail.

59-2-1351. Sales by county — Notice of final May tax sale — Tax deed — Entries on record.

(1) Upon receiving the Final May Tax Sale Listing from the county treasurer, the county auditor shall immediately advertise for sale during the month of May all real estate sold to the county at preliminary sale and not previously redeemed and upon which the period of redemption is expiring in the nearest forthcoming Final May Tax Sale.

(2) Notice of final tax sale shall be published four times in a newspaper published and having general circulation in the county, once in each of four successive weeks immediately preceding the date of sale. If no newspaper is published in the county, the notice shall be posted in five public places in the county, as determined by the auditor, at least 25 but no more than 30 days prior to the date of sale. Notice of sale shall also be sent by certified mail to the last known recorded owner and all other recorded lienholders, according to the deed, as of the preceding March 31, at their last-known address. In the case of the sale of the total parcel of property, unrecorded or unnotified lienholders may assert their liens against unclaimed property to the extent that money is available to satisfy the liens.